Supreme Court, U.S.
FILED
MAR - 7 2016
OFFICE OF THE CLERK

No. 15-415

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,
v.
HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "service advisors" at car and truck dealerships are exempt from the overtime pay requirements of the Fair Labor Standards Act under 29 U.S.C. § 213(b)(10)(A), which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state automobile dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars, LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such, who have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents franchised new car and truck dealers nationwide. Its members sell new cars and trucks and related goods and services as authorized dealers of various motor vehicle manufacturers and distributors doing business in the United States. As of February 2016, there were more than 18,000 franchised motor

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, having filed blanket consents with this Court on January 29 and February 1, 2016. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

vehicle dealerships in the United States. Of those, over 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a non-profit trade organization, incorporated in its respective state, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,500 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new cars and trucks and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of immense practical significance to amici and their automobile dealership members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on all franchised new motor vehicle dealers nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have relied in structuring their compensation plans for more than 40 years.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's automobile dealerships have relied on the overtime exemption in section 13(b)(10) of Fair Labor Standards Act (FLSA) for "any salesman primarily engaged in selling or servicing automobiles or trucks" in classifying and compensating their Service Advisors.[2] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based primarily on their sales productivity rather than on the number of hours they work. These compensation arrangements benefit both dealerships and employees, and Service Advisors are generally well paid for their contributions to dealership revenues.

The reliance of dealerships on the exemption is justified not only by the statutory language itself, but as important, by a solid wall of judicial authority interpreting the exemption's scope. Until the Ninth Circuit's decision in this case, every federal and state court interpreting the exemption, including several circuit courts of appeals, held that that it encompassed Service Advisors.

The decision of the Ninth Circuit interpreting the section 13(b)(10) exemption to exclude these well

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[2] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Manager, among other titles.

compensated sales employees, if allowed to stand, will disrupt what has until now been a settled and widely accepted compensation practice in the nation's car and truck dealerships.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs one or more Service Advisors. An estimated 45,000 Service Advisors work in dealerships across the United States. They are generally classified as exempt employees, often under section 13(b)(10). If allowed to stand, the decision will create unanticipated liability for past pay practices and windfalls to well compensated sales employees. It will also cause disruption and upheaval to dealerships and employees alike, because it will force dealerships to restructure Service Advisors' incentive-based compensation to avoid that liability going forward.

Amici urge the Court to reverse the decision of the Ninth Circuit and restore this key exemption for the nation's car and truck dealerships.

ARGUMENT

I. Service Advisors Are Key Contributors to the Revenues of Franchised Automobile Dealerships and Have Always Been Classified as Exempt Sales Employees

There are more than 18,000 franchised automobile dealerships in the United States, the great majority of which are represented by amici. Nationally, franchised dealerships employ nearly 1.1 million people and have a combined annual payroll of $60 billion. The overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised automobile dealership in the country has a service department. Service departments provide expert vehicle maintenance and repair services to dealership customers, and are a key revenue and profit center for dealerships. No position is more crucial to the automobile service function than the Service Advisor. Service Advisors evaluate customers' service and repair needs, advise customers about services to address specific problems, provide information about optional and supplemental services, and ensure the customer is satisfied with the service received. In short, Service Advisors are engaged in selling service, maintenance and repairs through the customer relationships they cultivate on a day-to-day basis.

NADA estimates that 45,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2014 the average annual compensation for Service Advisors nationwide was $65,876, with the top 10% earning on average more than $99,164 per year.[3] Compensation levels are significantly higher in NADA's Pacific Region (Alaska, California, Hawaii, Oregon and Washington), where the annual average is $75,769, and the top 10% earn on average $105,583 per year.[4]

Service Advisors are typically classified as exempt from overtime, often under section 13(b)(10) of the FLSA, which exempts "salesmen primarily engaged in selling or servicing automobiles or trucks."[5] The 13(b)(10) exemption requires nothing other than that the employee work in a sales or servicing role at the dealership. It thus provides flexibility in terms of compensation structure and level, including a generous and predictable base wage with the option for incentive pay as an upside to sales productivity.

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[3] National Automobile Dealers Assn. *et al.*, *2015 Industry Report: Dealership Workforce Study* (NADA 2014) (hereafter "*NADA 2015 Workforce Report*") at 13, 84.

[4] *Id.* at 80, 82.

[5] 29 U.S.C. § 213(b)(10).

II. More Than Three Decades of Jurisprudence and Agency Interpretation Confirm That Service Advisors Qualify for the 13(b)(10) Exemption.

Because of the importance of the 13(b)(10) exemption to franchised dealership businesses, over the years, amici have closely tracked judicial decisions and agency guidance addressing the scope of the exemption, and based on that authority, have advised their members on wage and hour compliance obligations with respect to Service Advisors. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[6] and up until the Ninth Circuit's decision in this case, the decisions of federal circuit courts,[7] federal district courts,[8] and state courts[9] have uniformly held that Service Advisors are covered by the exemption. In doing so, these courts rejected the interpretive regulation

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[6] 475 F.2d 1095 (5th Cir. 1973).

[7] *Deel Motors*, 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[8] *Clark & Day v. Palmen Motors*, No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Table).

[9] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont. 2013).

issued by the DOL in 1970, which limited the types of sales employee eligible for the exemption to those who sell automobiles and explicitly disqualified Service Advisors from the exemption.[10]

In the face of consistent judicial rejection of its 1970 interpretive regulation, the DOL rescinded that guidance in 1978, issuing an Administrator Opinion squarely holding that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are exempt when the majority of their sales in dollar volume is for non-warranty work.[11] In 1987, the DOL revised its enforcement bible, the Wage & Hour Field Operations Handbook (FOH), to reflect that opinion and to incorporate the judicial authority on which it was based.[12] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" to reflect the judicial interpretation of the exemption. That point came in 2008, when the DOL proposed regulations formally codifying the exemption's judicial interpretation as covering Service Advisors and confirming the agency's acquiescence to it over the previous three decades.[13]

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[10] 29 C.F.R. § 779.372

[11] U.S. Dep't of Labor, Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

[12] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[13] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

III. The DOL's Recent Attempt To Repudiate Judicial Authority and Renege on Its Own Acquiescence to that Authority Has Been Equivocal at Best.

In 2011, the DOL issued a final rule reflecting its current interpretation of the 13(b)(10) exemption, 29 C.F.R. section 779.372. The Final Rule rescinded subsection (c)(4) of the previous regulation, which had explicitly excluded Service Advisors from the exemption, consistent with the DOL's proposed 2008 interpretive regulation. The DOL chose not to revise the remainder of the interpretive regulation in accord with its 2008 proposal, however. It declined to clarify that the exemption encompassed Service Advisors, as it had previously proposed. It also retained the judicially rejected definition limiting exempt salesmen to those who sell vehicles, a definition it had previously proposed to delete. In explanatory remarks, the DOL stated that "there are circumstances under which the requirements for the exemption would not be met" by Service Advisors.[14]

Congress reacted swiftly and definitively to the DOL's about-face. Noting the Final Rule's impact on small businesses and expressing its profound disagreement with the action, Congress attached a limitation rider to appropriations bills for 2012 and 2013 barring the DOL from enforcing its

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[14] 76 Fed. Reg. 18832 (April 5, 2011).

regulatory changes with respect to Service Advisors.[15]

Further seeding the cloud of uncertainty over the import of its recent actions, the DOL has not revised its Field Operations Handbook to exclude Service Advisors from the scope of the exemption, nor has it formally rescinded its 1978 Opinion Letter approving the application of the exemption to Service Advisors.

IV. The Ninth Circuit Decision, if Allowed To Stand, Would Result in Unanticipated Liabilities for the Nation's Automobile Dealerships and Significant Disruption To Service Advisors Themselves.

Based on the consistent judicial interpretation of section 13(b)(10) over the last 40 years, and DOL's acquiescence in it for much of that time, NADA and other amici have advised their members that Service Advisors are encompassed within the FLSA's 13(b)(10) exemption. During that time, automobile dealerships across the country have relied on that advice and authority in classifying Service Advisors as exempt from overtime, and have structured their compensation and recordkeeping practices accordingly. The Ninth Circuit's decision, if allowed to stand, would upend these longstanding

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[15] Consolidated Appropriations Act of 2012, Pub.L. No. 112-74, Div. F § 113, 125 Stat. 786; Joint Resolution, Continuing Appropriations 2013, Pub.L. No. 112-175, 126 Stat. 1313.

understandings and create widespread unanticipated liability and disruption. Its impact in the real world of brick-and-mortar automobile dealerships cannot be overstated.

Without a reversal in this case, dealerships that have relied on the 13(b)(10) exemption in classifying their Service Advisors would face unanticipated liability for past violations, which at the time were not considered violations at all. If the exemption is foreclosed, these dealerships will be subject to private FLSA back pay claims and significant potential liability, given that the national average workweek for Service Advisors is nearly 47 hours.[16] In addition to unpaid overtime liability for seven hours per week going back up to three years, dealerships would face liability for liquidated damages equal to unpaid overtime, interest and attorney's fees.[17]

This specter is very real. Contrary to Respondents' assertions, the FLSA's section 7(i) exemption will be unavailable to a significant portion of the nation's dealerships. That exemption has multiple technical requirements concerning type of business, compensation structure and hourly wage average, each of which must be satisfied.[18] Heretofore, dealerships have had no need to consider

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[16] *NADA 2015 Workforce Report* at 109.

[17] 29 U.S.C. § 216(b).

[18] The 7(i) exemption applies only to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation. 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038, 1044-47 (9th Cir. 2005).

these requirements in structuring their pay and timekeeping practices due to the simplicity of section 13(b)(10), which has no such technical requirements.

The 7(i) exemption, for example, is not available to dealerships that do not qualify as "retail establishments" due to their mix of revenue sources. It will not help dealerships that derive significant revenues from non-retail sales.[19] Moreover, the exemption is not available to dealerships whose compensation plans have been structured to provide more generous base compensation in comparison to commissions. Nor will it be available to dealerships that have not kept time records to ensure their Service Advisors' average hourly compensation meets the 7(i) requirement of exceeding 1.5 times the minimum wage.

Furthermore, an affirmance would also have a significant disruptive impact on employees themselves, as dealerships will be forced to radically restructure previously agreed-upon compensation arrangements to avoid future liability Many will choose to put Service Advisors on an hourly pay plan, paying overtime but lowering or even doing away with commissions, thus eliminating some or all of the upside advantage provided to employees by commission pay for sales productivity. Others, at least those who qualify as retail establishments, may restructure Service Advisor compensation to allocate a greater proportion to commissions in an attempt to meet the 7(i) exemption, thus placing more wages at risk, a disadvantage to employees in lean economic

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[19] *Gieg*, 407 F.3d at 1047-49.

times. There is nothing more disruptive to an employee than changing her compensation plan, even when the result is that her net income is roughly equivalent.

In sum, an affirmance would lead to significant unanticipated liability for dealerships that have relied on the 13(b)(10) exemption, a reliance well justified by consistent, controlling authority. It would also be unduly disruptive to Service Advisors themselves going forward, and indeed is unlikely to benefit Service Advisors in any way.

CONCLUSION

The nation's automobile dealerships have relied on nearly four decades of settled law in structuring their compensation arrangements with Service Advisors. These arrangements reward sales production, not hours worked. An affirmance would upend settled law and result in significant unanticipated liability to dealerships and severe disruption to Service Advisors. Amici curiae respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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